Supreme Court of the United States

October Term, 1978
No. 78-1362

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

RAYMOND WALKER,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENT IN OPPOSITION

JAMES R. UNGER
Prosecuting Attorney
Stark County, Ohio

DALE T. EVANS
Assistant Prosecuting Attorney
Chief, Appellate Division
Courthouse Annex
P O Box 167 D T Sta.
Canton, Ohio 44701
Telephone: (216) 454-5651 Ext. 281
Counsel for Respondent

ERNEST P. MANSOUR
ELI MANOS
DAVID B. CATHCART
MANSOUR, GAVIN, GERLACK & MANOS Co., LPA
2150 Illuminating Building
Cleveland, Ohio 44113

STANLEY E. TOLLIVER
1835 Forest Hills Boulevard
East Cleveland, Ohio 44112
Counsel for Petitioner

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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To the Honorable Chief Justice and the Honorable Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION

Respondent respectfully submits that there is no substantial federal constitutional question involved in this cause which would invoke jurisdiction of this Court. The petition itself demonstrates that there was substantial evidence which if believed by the Trier of Fact constituted proof beyond a reasonable doubt of all the elements of

the crime charged against the petitioner. As hereafter pointed out the first "question presented for review" by the petitioner does not involve an issue under the due process clause of the Fourteenth Amendment, but in fact involves only the question of credibility of witnesses, a matter to be determined by the jury. Likewise the second "question presented for review" does not arise to constitutional proportions, but involves no more than a determination of the application of Ohio Rules of Evidence. Separately and additionally the petitioners have a remedy under State law in the form of Section 2953.21 of the Ohio Revised Code—the Ohio Post-Conviction Remedy Act (Appendix p. 13).

REASONS FOR DENYING THE WRIT

It is clear that the sole issue raised by the first question presented in petitioner's pleading is one of credibility of the witnesses at the trial of his cause.

The bold assertion that petitioner's conviction is "devoid of evidentiary support" is rebutted by his own analysis of that evidence. He notes that two co-defendants testified against him and identified him as the triggerman in the felony murder.

A totally independent eyewitness, Rene Clark, likewise identified him as the killer (R-268-271). This young lady was simply a patron in the store where the robbery-homicide occurred. The wife of the victim who was standing with him when he was shot testified that the petitioner "looks very much like the man" (R-136).

As noted by the Ohio Supreme Court in its *per curiam* opinion, another witness, Willie Mae Hart, testified to seeing an automobile driven by a man with a bad complexion

similar to petitioner's on the escape route described by the co-defendants shortly after the offense.

Each of these witnesses was subjected to extensive cross-examination to test their credibility. The question of the accuracy or propriety of the in-court identification by the witnesses was never challenged by pretrial suppression proceedings giving rise to an issue of waiver and diluting the value of this cause as vehicle for any precedent.

Petitioner must acknowledge that there was evidence in the record which if believed by the jury supports the judgment. What he urges in his first question presented is that these witnesses should not be believed. That, it is submitted, is a credibility issue. Credibility of any given witness is determined by the jury as a question of fact.

Thus the petitioner's claim that the judgment of conviction is "devoid of evidentiary support" is untrue and misleading. The proposition in fact advanced to this Court by petitioner is that the Court should accept his evaluation of these witnesses' credibility and reject that of a jury which had the witnesses before them. He would likewise require this Court to substitute its judgment on credibility of the alibi evidence for that of the jury.

The alibi claimed was that the defendant was in jail in Cleveland, Ohio at the time of the homicide in Canton. Yet the testimony of two other State's witnesses who knew the defendant placed him on the streets of Cleveland at that time. These were Clarence Cash and James Curry. The testimony of Rene Clark, Warren Davidson, Fred Ogletree and Mable Mack, likewise demonstrated that he was not in jail at the time of the crime. This is a question of disputed fact to be determined by a jury pursuant

to the Trial Court's instruction. The Court's charge has never been challenged either at trial or upon review of this case. The petitioner advanced in the Supreme Court of Ohio as support for his alibi defense the proposition that "a court order directing that a defendant be incarcerated pending a trial cannot be collaterally attacked by evidence that the defendant was not incarcerated during this period". The Ohio Supreme Court rejected this attempt to establish an irrebuttable presumption from the Bench during argument.

An analysis of the cases cited in support of petitioner's first question presented demonstrates that they do not support his position at all. Appropriate tests for the weight of the evidence in a criminal prosecution on due process grounds is set forth in this Court's opinions in *Thompson v. Louisville*, 362 U.S. 199 (1960) and *Harris v. United States*, 404 U.S. 1232 (1971). The test as set out in *Thompson* is:

> "Decisions of this question [whether the charges against petitioner were so totally devoid of evidentiary support as to render his conviction unconstitutional under the due process clause of the Fourteenth Amendment] turns not on sufficiency of the evidence, but on whether this conviction rests upon any evidence at all (362 U.S. 199)."

This cause involved the review of a police court conviction for loitering and disorderly conduct under circumstances where the court determined that there was no evidence at all of the elements of the crime. Compare this then with the petitioner's own statement as to the evidence adduced by the State in the trial of Raymond Walker. Obviously his challenge is not to the sufficiency of the evidence, but rather to the credibility of the witnesses

who testified. *Harris, supra,* simply reiterates the due process standard of *Thompson, supra.* It is distinguishable for the reason that it involved a Federal Narcotics Prosecution. This Court approved *Thompson* and *Harris, supra,* in its 1974 decision in *Uahon v. New Hampshire*, 414 U.S. 478 (1974), where in determining that willfulness was an element of the crime of contributing to the delinquency of a minor, the Court's analysis demonstrated that no evidence of that element appeared in the trial transcript. Appellant's reference to *Washington v. United States*, 357 U.S. 348 (1957) in support of his claim is totally misplaced for it involved a federal prosecution and does not appear to support the proposition that this Court will review the sufficiency of the evidence in State Criminal Convictions.

It is further submitted that this case does not constitute an appropriate vehicle for weighing the problems raised by Mr. Justice Stewart in his dissent in *Freeman v. Zahradnick*, 429 U.S. 111 (1977) or *In Re*: *Winship*, 397 U.S. 358. For the opinions of the State Courts which have reviewed the conviction demonstrate that there was no mere speculation as to whether the evidence was sufficient to support the conviction. To the contrary, the conviction is supported by the testimony of four eyewitnesses to the crime and the additional testimony of three other witnesses to demonstrate that the alibi was insufficient to raise a reasonable doubt. Furthermore, there was no objection to the Court's instruction on burden of proof nor any basis other than speculation that the jury did not follow their instructions or properly determine the credibility of the witnesses. The question of the credibility of witnesses in the trial of a cause is not a constitutional issue. Unless this Court is prepared to reject the historical function of the jury in our system of jurisprudence the

writ herein sought should be denied. Review of this case could accomplish no more than a re-evaluation of witness credibility which has already been tested at two Appellate levels of Ohio Courts.

Petitioner's second contention that the decision of the Supreme Court of Ohio is in conflict with due process pronouncements of this Court is not supported by the authorities proffered. This cause involves no sensational press coverage within the context of this Court's opinions in *Estes v. Texas*, 381 U.S. 735 (1965), *Irwin v. Dowd*, 366 U.S. 717 (1960) and the circus described in *Sheppard v. Maxwell*, 384 U.S. 333 (1966). While citing these authorities petitioner points to no parallel facts. There was no motion for change of venue in the proceedings. Petitioner acknowledges at page 24 of his petition that no outside influences touched the trial of this case. Instead, he would apply the standards of these opinions—fashioned to avoid a recognized due process problem—to the entirely separate and distinct question of a trial judge's discretion in controlling proceedings within his court. At most, this case raises no issue beyond the application of State Rules of Evidence and the generally accepted principle of waiver by failure to object, as noted in the opinion by the Supreme Court of Ohio (Petitioner's Memorandum Appendix pages 33-34). See also *U. S. v. Gaines*, 450 F.2d 186, *Cert. Den.* 405 U.S. 927; *U. S. v. Bessesen*, 433 F.2d 861, *Cert. Den.* 401 U.S. 1009. The State does not dispute petitioner's fundamental right to be "fairly tried in a tribunal free of prejudice, passion, excitement, and tyrannical power", *Chambers v. Florida*, 309 U.S. 227, 236-237 (1940). Nor that at trial dominated by a mob may deny due process as in *Moore v. Dempsey*, 261 U.S. 86 (1923). This Court's determination that a judge who has a "direct personal substantial pecuniary interest" in the trial of the case

deprives the defendant of due process in *Tumey v. Ohio*, 273 U.S. 510 (1927) likewise is inappropriate.

Respondent does dispute the claim that the petitioner in the instant case comes within the purview of these authorities. There is nothing in the record below to compare with *Chambers, supra*, highly inflammatory racial setting with its dragnet arrest or its confession exhorted through complete isolation, intimidation and fear. Nor does it compare with *Moore, supra*, where the defendant had been deprived of assistance of counsel in a trial which lasted forty-five minutes with the jury out only five minutes, the verdict being "based" on testimony of witnesses who had been beaten and tortured until they agreed to say what the prosecution wanted them to say. The cases cited by petitioner in support of his claim that the trial court lacked impartiality are also distinguishable. The petitioner was not tried by a one man judge-grand jury as in *In Re: Murchison*, 349 U.S. 133 (1955) or by a mayor with a pecuniary interest in the outcome of the cause as in *Tumey, supra*. Instead he was tried by a jury, given an extensive voir dire examination, after which the State and the defense indicated their satisfaction. These jurors took an oath and agreed to follow the instructions of the Court as far as the applicable law is concerned. No objection was ever raised on appeal as to the court's charge to the jury and from such a record it should be assumed that the jury properly performed its duty without bias or prejudice. As to the Trial Judge, nothing in the record demonstrates partiality or personal interest in conviction of this defendant. The only support sought by petitioner in the record for his claim that the judge constituted a vengeful second prosecutor was the statement attributed to him some three years prior to the trial that he hoped that the Guy Mack murder could be solved.

No parallels can be drawn between petitioner's trial and those noted by this court in *Estes v. Texas,* 381 U.S. 735 (1965), *Sheppard v. Maxwell,* 384 U.S. 333 (1966), *Irwin v. Dowd,* 366 U.S. 717 (1960), and *Murphy v. Florida,* 421 U.S. 794 (1974). (The latter erroneously cited as *Chambers v. Flondie,* 309 U.S. 227 at page 24 of petitioner's petition.) The court in *Murphy, supra,* characterized each of these cases:

In *Estes,* the extensive televising and broadcasting led to a "circus atmosphere" which interfered with the trial process. In *Irwin,* the extensive trial publicity which led to the impaneling of a jury, eight of whom admitted to preconceived ideas of defendant's guilt caused actual prejudice to the defendant, deprived him of a fair trial. In *Sheppard,* the extremely inflammatory publicity and courthouse given over to accommodate the public appetite for a carnival led to a due process violation. In all these cases there was such overwhelming external influences that a presumption of inherent prejudice was raised. But as in *Murphy, supra,* the defendant-petitioner here cannot make that claim.

The assertions made by the appellant-petitioner have been characterized by Ohio State Courts as matters of evidentiary rulings or matters of the trial court's discretion in control of cross-examination. The Ohio Supreme Court found these objections "totally lacking in substance" or as in the case of the testimony of witness John Appling, waived by failure to object.

Most of the claims of error involved the evidence presented in rebuttal of defendant's alibi. As a matter of state law, both the Ohio Supreme Court and the Fifth District Court of Appeals found this evidence to be relevant and material because appellant had "placed in issue

the credibility generally of the records, the record-making process and the record-keepers". The Ohio Supreme Court held that the "contested evidence went to the credibility of the various jail records by demonstrating the overall inefficiency of persons and the system in which they were maintained and the general lack of inmate supervision". As this Court noted in *Gregger v. Burke,* 334 U.S. 728 (1948) "we cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise every erroneous decision by a state court or state law would come here as a federal constitutional question". (334 U.S. at page 731). In *Buchalter v. Peoples of the State of New York,* 319 U.S. 427 (1943), this Court noted that the due process clause of the federal constitution "leaves the states free to enforce their criminal laws under such statutory provisions and common law doctrines as they deem appropriate; and does not permit a party to bring to the test of a decision in this court every ruling made in the course of a trial in a state court" (319 U.S. at pages 430-431). The court went on to state "it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the results set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality" (319 U.S. at 431, citing *Adams v. U. S.,* 319 U.S. 269, 281). In *Donnelly v. DeChristoforo,* 416 U.S. 637 (1974), this Court again noted that care must be taken in distinguishing between ordinary trial error and that sort of "egregious misconduct" held to amount to a constitutional denial of due process. *Donnelly, supra,* involved an allegedly improper remark by the prosecuting attorney and this Court noted that corrective measures had been taken (as taken by Judge DeHoff in the instant case regarding the remark concerning witness Miller) and that the allegations

made, even if error, were not enough to make the trial "fundamentally unfair".

The decision of the Supreme Court of Ohio and the Fifth District Court of Appeals for Ohio sought to be reviewed in the instant cause are in compliance with the controlling cases and decisions of this Court. The rule of *Buchalter, supra,* and *Donnelly, supra,* appears to be a strict one placing a burden upon the petitioner to show unfairness and prejudice of a constitutional dimension. Petitioner's complaints in the instant case rise no further than matters of judicial discretion and the Rules of Evidence of the State of Ohio. They certainly do not rise to constitutional dimensions. Since the decision of the Supreme Court of Ohio was based in part upon the Ohio Rule of Evidence whereby waiver of errors rises out of the failure to object at such time as the trial court could avoid or correct the error complained of, petitioner has an adequate remedy for review of those issues so waived as noted in the opinion of the Supreme Court of Ohio. Section 2953.21 of the Ohio Revised Code, the Ohio Post-Conviction Remedy Act, provides for the filing of a petition in the trial court for review of constitutional errors at any time. The question of effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution and the applicable provisions of the Ohio Constitution are amenable to review in such proceedings and this issue has not been raised before any Ohio Appellate Court at this point. Since it appears that petitioner fails to raise any substantial federal constitutional question and has an adequate remedy under existing Ohio statutes, it is respectfully submitted that Certiorari should be denied.

CONCLUSION

In light of the foregoing facts and the authorities cited, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JAMES R. UNGER
Prosecuting Attorney
Stark County, Ohio

DALE T. EVANS
Assistant Prosecuting Attorney
Chief, Appellate Division
Courthouse Annex
P O Box 167 D T Sta.
Canton, Ohio 44701
Telephone: (216) 454-5651 Ext. 281
Counsel for Respondent

APPENDIX

§2953.21 O.R.C.—Petition to vacate or set aside sentence.

(A) Any person convicted of a criminal offense or adjudged delinquent claiming that there was such a denial or infringement of his rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, may file a verified petition at any time in the court which imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file such supporting affidavit and other documentary evidence as will support his claim for relief.

(B) The clerk of the court in which the petition is filed shall docket the petition and bring it promptly to the attention of such court. A copy of the petition need not be served by the petitioner on the prosecuting attorney. The clerk of the court in which the petition is filed shall immediately forward a copy of the petition to the prosecuting attorney of that county.

(C) Before granting a hearing the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider, in addition to the petition and supporting affidavits, all the files and records pertaining to the proceedings against the petitioner, including but not limited to the indictment, the court's journal entries, the journalized records of the clerk of court, and the court reporter's transcript. Such court reporter's transcript if ordered and certified by the court shall be taxed as court costs. If the court dismisses the petition it shall make and file findings of fact and conclusions of law with respect to such dismissal.

(D) Within ten days after the docketing of the petition, or within such further time as the court may fix for good cause shown, the prosecuting attorney shall respond by demurrer, answer, or motion. Within twenty days from the date the issues are made up either party may move for summary judgment as provided in section 2311.041 (2311.04.1) of the Revised Code. A bill of exceptions is not necessary in seeking summary judgment. The right to such judgment must appear on the face of the record.

(E) Unless the petition and the files and records of the case show the petitioner is not entitled to relief, the court shall proceed to a prompt hearing on the issues, hold the hearing, and make and file written findings of fact and conclusions of law upon entering judgment thereon.

(F) At any time before the demurrer, answer, or motion is filed, the petitioner may amend his petition with or without leave or prejudice to the proceedings. The petitioner may amend his petition with leave of court at any time thereafter.

(G) If the court finds grounds for granting relief, it shall, by its judgment, vacate and set aside the judgment, and shall, in the case of a prisoner in custody, discharge or resentence him or grant a new trial as may appear appropriate. The court may also make supplementary orders to the relief granted, concerning such matters as rearraignment, retrial, custody, and bail.

(H) Upon the filing of a petition pursuant to this section by a prisoner in a penal institution who has received the death penalty the court may stay execution of the judgment challenged by the petition.